UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
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OFFICE OF
WATER AND WATERSHEDS

April 12, 2013

Via email to rasmithwa@igc.org and U.S. mail

Mr. Richard Smith
Smith & Lowney, PLLC
2317 East John St
Seattle, Washington 98112

Dear Mr. Smith:

Thank you for your letters of December 3 and 13, 2012. In your letters, you requested either approval or disapproval of Washington Department of Ecology's (Ecology's) alleged constructive submission of a Total Maximum Daily Load (TMDL) for PCBs for the Spokane River. With your letters, you submitted documents for review by Region 10 of the Environmental Protection Agency (EPA). We understand you to contend that EPA is required to establish a TMDL for PCBs in the Spokane River as a remedy to what you believe is Ecology's effective disavowal of ever establishing such a TMDL. EPA has reviewed the submitted documents as well as other documents in responding to your request. For reasons explained in this letter, EPA has determined that Ecology's decision to delay completion of a PCB TMDL for the Spokane River is within the discretion of the State of Washington. EPA does not believe that Ecology has renounced completion of a PCB TMDL for the Spokane River if one is required. EPA also does not believe that there has been a constructive submission by Ecology of a PCB TMDL for the Spokane River nor that EPA is required to issue such a TMDL in lieu of Ecology.

Based on the administrative record, EPA believes that Ecology has, over the past fifteen years, demonstrated its commitment to develop and implement an effective Clean Water Act (CWA) Section 303(d) program. Although TMDLs for many water-quality-limited water body segments throughout Washington remain to be established, including a TMDL for PCBs in the Spokane River, Ecology is continuing to establish large numbers of TMDLs each year in accordance with its judgment of how best to protect the environment and allocate its limited resources. Ecology has established and EPA has approved 860 TMDLs[1] since 1999, and Ecology is currently working on the development of TMDLs in 23 sub-watersheds throughout the state for numerous pollutants, including temperature, dissolved oxygen, sediment, bacteria, and pH.[2] Ecology has committed significant staff resources to all phases of the Section 303(d) process, including the establishment of TMDLs.[3]

The CWA and its implementing regulations require states to prioritize waters on their Section 303(d) lists for TMDL development and also to identify those impaired waters targeted for TMDL development in the

[1] EPA Region 10 has historically counted Washington TMDLs using a waterbody segmentation system developed for the 1996 303(d) list. If EPA's nationally standardized counting system is used to count TMDLs, the total number of TMDLs developed by Ecology and approved by EPA since 1999 is 1372.
[2] 2010 Water Quality Assessment & 303(d) List Prioritization Schedule. Washington Department of Ecology. June 2012.
[3] Environmental Performance Partnership Agreement for July 1, 2009 – June 30, 2011 Between the Washington State Department of Ecology and the US Environmental Protection Agency – Region 10. July 10, 2009.

following two years.[4] In prioritizing and targeting waters, states must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters.[5] States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs; vulnerability of particular waters as aquatic habitats; recreational, economic, and aesthetic importance of particular waters; degree of public interest and support; and state or national policies and priorities.[6]

EPA considers that Washington's effective priority-setting process is part of its robust Section 303(d) program. Annually, Ecology completes a water quality improvement project planning process that leads to the selection of the TMDLs that will be started during the next year. The process includes: (1) pre-scoping of proposals; (2) a water quality meeting that brings together staff from the regions and headquarters to evaluate proposals and make strategic plans; and (3) project refinement and selection.[7] The Memorandum of Agreement[8] signed by Ecology and EPA on October 29, 1997, describes the criteria used in setting priorities and the rotating basin scoping process used by the state to establish the schedule for completion of TMDLs.

As part of Ecology's 2010 Integrated Report, Ecology developed a priority ranking of listed waters for TMDL development consistent with the requirements of 40 CFR 130.7(b)(4) that a state "shall include a priority ranking for all listed water quality limited segments still requiring TMDLs." In EPA's December, 2012, approval of the 303(d) list, EPA concluded, based upon the required documentation provided by the state, [9] that Washington's priority ranking of listed waters for TMDL development met the requirements of CWA Section 303(d) and the implementing regulations. EPA also reviewed the state's identification of impaired waters targeted for TMDL development in the next two years and concluded that the state's process for targeting waters for TMDL development in this period is appropriate.

Washington's implementation of TMDLs in Washington is an indicator of the strength of its Section 303(d) program. Ecology and EPA's 1997 Memorandum of Agreement outlines the way in which Washington will develop TMDLs and implementation plans through 2013. In accordance with this MOA, Ecology develops site-specific TMDL implementation plans that identify and prioritize the actions needed to restore water quality, identifies the type of monitoring that is needed in order to track progress, and estimates how long it will take to attain water quality standards. TMDL implementation plans are developed by Ecology in cooperation with local governments, business, tribes, and environmental groups. These implementation plans are not required by the Clean Water Act or its implementing regulations but are considered by EPA to be an effective way to improve water quality.

EPA supports Ecology's (and other states') use of interim, supplemental approaches to meet water quality standards in impaired waters prior to TMDL development. States must prioritize and schedule development of TMDLs over many years. For those waters that are not given a high priority by the state, implementation of interim approaches to address pollution causing the impairment allow for water quality improvements to be made while TMDL development is pending. If water quality standards are attained through implementation of such interim, supplemental approaches, development of a TMDL would not be necessary. If the water remains impaired, a TMDL would need to be established. The interim approaches used in the State of Washington are often referred to as "straight to implementation" (STI) projects, although the definition and use of this term are

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[4] 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(b)(4).
[5] 40 C.F.R. § 130.7(b)(4).
[6] Guidance for Water Quality-based Decisions: The TMDL Process. US EPA. 440/4-91-001. April 1991.
[7] 2010 Water Quality Assessment & 303(d) List Prioritization Schedule. Washington Department of Ecology. June 2012.
[8] Memorandum of Agreement Between the United States Environmental Protection Agency and the Washington State Department of Ecology Regarding the Implementation of Section 303(d) of the Federal Clean Water Act. October 29, 1997.
[9] 40 C.F.R. § 130.7(b)(6).

changing over time. An STI or similar interim approach typically includes the following characteristics: identification of the sources of contamination and identification and implementation of best management practices that will reduce contaminants reaching the water body. EPA is supportive of states exercising their discretion to implement such approaches pending TMDL development for impaired waters for which the state has not given a high priority.

One such interim approach is being used by Ecology and the Spokane River Regional Toxics Task Force (SRRTTF) to address PCB impairments in the Spokane River.[10] The goal of the SRRTTF is to develop a comprehensive plan to reduce PCBs in the Spokane River, and, if possible, to bring the Spokane River into attainment with applicable CWA water quality standards for PCBs. Along with the State of Washington and EPA, task force members include NPDES permittees in the Spokane River basin, conservation and environmental interests such as the Spokane River Keeper and The Lands Council, Spokane Regional Health District, and other appropriate interests. Ecology has issued NPDES discharge permits that require the City of Spokane and four other NPDES permittees in the Spokane Basin to participate in the Task Force.[11] In upcoming NPDES permits for three Idaho municipal dischargers to the Spokane River, EPA proposes to require the City of Coeur d'Alene, the City of Post Falls, and the Hayden Area Regional Sewer Board to participate in the task force.

The SRRTTF members will work together to characterize the sources of toxics, including PCBs, in the Spokane River, and to identify and implement appropriate actions needed to make progress towards meeting water quality standards. The SRRTTF work plan outlines the tasks required to complete this work, with the goal of completing all phases of the project by 2016. Ecology indicated in its May 2012 letter to EPA that within five years, Ecology, in consultation with the SRRTTF and its regulatory partners (EPA, Idaho Department of Environmental Quality, and the Coeur d'Alene and Spokane tribes), will evaluate the progress in reducing PCB contamination in the Spokane River. If Ecology determines that the SRRTTF is failing to make measureable progress toward meeting applicable water quality criteria for PCBs, Ecology has acknowledged that it will proceed with development of a TMDL in the Spokane River for PCBs if necessary.

On December 3 and 13, 2012, the Sierra Club submitted documents for EPA's review in support of its request for action on Ecology's alleged constructive submission of a PCB TMDL for the Spokane River. The parties in *Sierra Club v. McLerran*, W.D. Wash. No. 11-1759RSL, agreed which of the documents submitted by Sierra Club would be incorporated into the Administrative Record for EPA's action on the alleged constructive submission. These documents, together with all the other documents in the record, support EPA's determination that Ecology has not constructively submitted a TMDL for PCBs in the Spokane River.

The documents that the Sierra Club submitted to EPA provide some of the history for a PCB TMDL for the Spokane River going back as far as 2006. These historical documents show that Ecology had for some time been aware of and attempted to address excess PCBs in the Spokane River and had initiated development of a draft PCB TMDL for the Spokane River. A preliminary draft TMDL prepared by Ecology indicated the potential need for significant pollutant reductions from existing point sources. In late 2008, Ecology put the Spokane River PCB TMDL on hold. The documents show that Ecology had at least two compelling reasons for delaying development of the TMDL. The first was a lack of data. Although numerous PCB data are available

[10] Although at one time Ecology called the Spokane River Regional Toxics Task Force an STI project, more recent references to the SRRTTF in Ecology's documents do not use this term. The EPA is not concerned about the name used by Ecology as long as Ecology continues to recognize that an STI, or any other interim approach to water quality improvement, is an interim, supplemental tool that does not displace ultimate TMDL development if needed.

[11] In 2012, Ecology issued NPDES permits that require the following entities to participate in the task force: City of Spokane; Spokane County; Inland Empire Paper Company; Kaiser Aluminum; Liberty Lake Sewer and Water District.

for the Spokane River, there were important data gaps, including lack of stormwater and fish tissue data. Documents in the record refer to these data gaps, and SRRTTF documents show that the first phase of the SRRTTF workplan was to collect additional data. Ecology's second reason for delaying development of a PCB TMDL was related to the dissolved oxygen TMDL that Ecology was developing for the Spokane River. Ecology spent many years working closely with EPA and Idaho to finalize that TMDL, limiting its ability to simultaneously develop the PCB TMDL. In addition, the dissolved oxygen TMDL triggered conflict and litigation that delayed finalization of that TMDL. Since the parties and issues involved in the dissolved oxygen TMDL overlapped with those of the PCB TMDL, Ecology believed that the PCB TMDL would be subject to the same intense scrutiny and similar delays in implementation. These factors support Ecology's decision not to finalize a PCB TMDL for the Spokane River prematurely, e.g., before adequate information and resources are available. Ecology also concluded that other interim approaches to address PCBs in the Spokane River had the potential to fill the existing data gaps and to achieve PCB reductions until such time that a needed PCB TMDL is issued.

The documents in the administrative record show that Ecology acknowledges that the interim approaches being used to investigate and address PCBs in the Spokane River do not substitute for a TMDL and that, if the interim approach does not succeed in reducing PCBs to a level that meets the water quality standard, the state will proceed with development of a TMDL for PCBs in the Spokane River if necessary. This acknowledgment leads EPA to conclude that Ecology has not repudiated its legal obligation to develop a PCB TMDL if needed.

EPA Region 10 actively oversees Ecology's CWA-based water quality programs. EPA believes that the most efficient and effective approach to implement its oversight responsibilities is to work in partnership with Ecology to implement a TMDL program that is consistent with the goals and requirements of the Clean Water Act as well as state priorities. At present, Ecology has demonstrated to EPA its commitment to develop and implement an effective Section 303(d) program that reflects the state's priorities. Ecology's priorities include on-the-ground implementation of activities that improve water quality through development of TMDLs, as well as interim approaches where TMDLs have not yet been issued. EPA does not believe that it would be appropriate in these circumstances for it to usurp Ecology's authority by issuing a PCB TMDL for the Spokane River at this time. The state's approach balances its available resources for issuing TMDLs with other effective tools to reduce pollution within its borders where TMDLs have not yet been issued. Consequently, EPA concludes that Ecology has not constructively submitted to EPA a PCB TMDL for the Spokane River, and to the extent that such a constructive submission could be considered to have occurred, EPA declines to disapprove such a constructive submission.

EPA will continue to monitor Ecology's efforts to reduce PCB pollution in the Spokane River as well as its ongoing progress in issuing TMDLs for other water bodies. EPA may reconsider this decision if significant, relevant circumstances change.

Sincerely,

Christine Psyk, Associate Director
Office of Water and Watersheds